

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

THOMAS E. PEREZ, SECRETARY OF  
LABOR, UNITED STATES DEPARTMENT  
OF LABOR,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE,

Defendant.

No. C12-00315 RSM

ORDER DENYING SUMMARY JUDGMENT

This matter comes before the Court on Defendant's Motion for Summary Judgment. Dkt. # 51, Ex. 1. The Court finds this matter appropriate for resolution on the briefing. Having considered Defendant's motion and supporting documentation and the opposition thereto, as well as the remainder of the record, and for the reasons stated herein, the Court denies summary judgment.

**Factual Background**

Plaintiff United States Department of Labor ("DOL") filed the instant lawsuit on February 24, 2012, seeking injunctive and other relief for alleged discrimination by Defendant United States Postal Service ("USPS") against its employee Arthur Williams, in violation of § 11(c) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 651 *et seq.* See Dkt. # 31 (hereinafter,

1 “Compl.”), ¶ 6; Dkt. # 58, Ex. 1. Mr. Williams was hired by USPS on July 10, 1995. Compl. at ¶ VIII.  
2 He thereafter received several promotions, including in October 2006 to Safety Specialist at grade 17  
3 on the Executive and Administrative Pay Schedule (“EAS”), at which point his work station was  
4 changed from the Queen Anne District Office to the Seattle Processing & Distribution Center (“Seattle  
5 P&DC”). Dkt. # 58 (“Williams Decl.”), ¶ 23. Mr. Williams thereafter served as the occupational safety  
6 and health technical advisor for the Seattle P&DC and three other facilities, where, among his duties,  
7 he conducted regular safety inspections, investigated accidents, and ensured compliance with health  
8 and safety rules. *Id.* at ¶ 24; Compl. at ¶ VIII. Mr. Williams’ annual performance review of November  
9 2, 2007 indicated that he met expectations in two of four core categories, received a “high contributor”  
10 ranking in one category, and received an “exceptional contributor” ranking in “managing accident  
11 reduction plans.” Dkt. # 58, Ex. 4.

12  
13 On February 20, 2008, Naseem Banani, a temporary, non-union employee at the Seattle  
14 P&DC, went to Williams’ office with two union representatives and informed Williams that she was  
15 experiencing health complications from her work on a machine and that her supervisor had threatened  
16 to fire her if she was unable to continue her work. See Dkt. # 57, Ex. 7, pp. 23-25. Williams assisted  
17 Banani by informing her of her rights and providing her a telephone number to contact OSHA. *See id.*  
18 at p. 27; Williams Decl., ¶ 33. That same day, Mr. Williams emailed two of his supervisors to inform  
19 them his interaction with Banani, wherein he wrote that “OSHA will be reviewing the results to  
20 determine if we have a health issue.” *Id.* at ¶ 34 & Ex. 5.<sup>1</sup>

21 Williams alleges that he was subject to a number of retaliatory events and practices subsequent  
22 to assisting Banani with her OSHA report, which have caused him to experience stress, anxiety, and  
23 depression. On February 26, 2008, the same day that OSHA informed USPS of Banani’s complaint,  
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25 <sup>1</sup> Plaintiff asserts that Williams engaged in additional protected activities when he accompanied an OSHA inspection of the  
26 P&DC on March 19, 2008 and filed complaints of retaliation against Defendant with OSHA. *See* Dkt. # 58, ¶¶ 46, 59, 65, 89, 95.

1 USPS transferred Mr. Williams to USPS's Queen Anne District Office. Williams testifies that the  
2 transfer occurred precipitously, without process and without opportunity for him to collect his manuals  
3 and personal belongings from the Seattle P&DC. Dkt. # 57, Ex. 13, pp. 19-20, 46. Williams was  
4 placed at a secretarial desk "in the middle of the floor," a placement that allegedly "humiliated" him,  
5 before being moved to a small and "isolated" office, which a former USPS Labor Relations Manager  
6 described as a "very cold" and "damp" storage area. *Id.* at Ex. 13, pp. 24-25; *id.* at Ex. 11, pp. 178-79.  
7 Although Williams officially maintained his EAS 17 ranking, he reports that his duties were reduced  
8 to "menial tasks," such as filing reports prepared by other safety specialists and cleaning his office. *Id.*  
9 at Ex. 13, pp. 22-23; Williams Decl., ¶ 57.

10  
11 Also on February 26, 2008, Senior Plant Manager Don Jacobus informed Williams by email  
12 that he was "displeased" with aspects of his work and that Williams' "continuing and obvious interest  
13 in representing the bargaining unit will not be tolerated." Dkt. # 57 at Ex. 9, p. 19. The email directed  
14 Williams to refrain from "ANY professional dialogue with the bargaining unit with exception of  
15 [Williams'] domiciled safety advocates and team meetings or projects." *Id.* On February 27, 2008,  
16 Manger of Distribution Operations ("MDO") Carlos Salazar sent an email to MDO Pamela Cook  
17 informing her that Don Jacobus "does not want [Williams] to have anything to do with [the OSHA  
18 complaint.]" Dkt. # 57, Ex. 5, p. 27. A month later, USPS manager Kelly Johnson extended  
19 restrictions on Williams' communications to bar him from engaging in conversations with craft  
20 employees and to prohibit him from walking on the workroom floor unless instructed to do so by a  
21 supervisor. Williams Decl. at Ex. 8; Dkt. # 57, Ex. 1, p. 60 (email from Johnson sent March 20, 2008,  
22 reminding Williams that he is not permitted "to be out on the workroom floor").

23 Beginning on March 5, 2008, Johnson conducted the first of four investigative interviews with  
24 Williams, which Johnson contends were motivated by three complaints by Jacobus about Williams'  
25 on-the-job performance: berating of a forklift driver for driving too fast, maintaining a messy office,  
26

1 and failing to timely complete reports. *See* Dkt. # 57, Ex. 1, p. 83. Williams, who characterized  
2 Johnson's demeanor during the interviews as antagonistic and disrespectful, alleges that the interviews  
3 were motivated instead by and focused principally on his assistance to Banani. *See* Williams Decl. at  
4 ¶¶ 42, 49, 54, 75. Following the third interview on April 11, 2008, Williams went on Family Medical  
5 Leave Act ("FMLA") leave due to stress, headaches, and difficulty sleeping and began receiving  
6 treatment for psychosis and depression. *See id.* at ¶¶ 55-56; Dkt. # 57, Ex. 13, p. 36. Williams  
7 contends that Johnson subsequently changed his leave status from FMLA to annual/sick leave despite  
8 receiving notes from Williams' physician indicating that he was being treated for a serious medical  
9 condition. Williams Decl. at ¶¶ 61-65.

10  
11 When Williams attempted to return to work on July 28, 2008 with clearance from his physician  
12 to work under different supervision, Johnson informed Williams that he had "not been cleared to  
13 work" and ordered him to return home. *Id.* at ¶ 68; Dkt. # 57, Ex. 1, p. 158. Later that day, Johnson  
14 sent Williams a letter notifying him that he would be placed on enforced leave as a result of his  
15 medical condition. *Id.* at p. 72. Upon his return to work on September 15, 2008 with full clearance  
16 from his physician, Williams was again placed at a secretary's desk and Johnson publicly announced  
17 the reassignment of Williams' responsibility of the P&DC to an EAS 16 employee. Williams Decl., ¶  
18 72. On October 3, 2008, Johnson issued Williams a formal Letter of Warning, accusing him of failing  
19 to follow USPS policies, including his duty of "loyalty" to Defendant. Williams Decl. at Ex. 13.  
20 Williams' 2008 annual performance evaluation reflected this displeasure; Johnson ranked him as a  
21 "noncontributor" on oral communication and described him as uncooperative and unforthcoming. *Id.*  
22 at Ex. 4, p. 22.

23 Williams contends that Defendant continued to retaliate against him on account of his  
24 protected activities by refusing to consider him for an EAS 20 Manager of Safety position, for which  
25 Williams applied in October 2009. One of the three members of the applicant review committee,  
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1 Charles Kosmicki, testified that the selection officer, Helen Pelton, explicitly informed Kosmicki that  
2 she did not want Williams' name put forward for an interview, mentioning his "prior EEO activity and  
3 Whistleblower complaint as reasons." Dkt. # 57, Ex. 11, p. 50. Kosmicki asked to be removed from  
4 the committee as a result of the interaction, which he regarded as improper, though Pelton did not  
5 allow him to withdraw. *See id.* Kosmicki ultimately determined that Williams was not minimally  
6 qualified for the position. He later testified that he "sure want[ed] to believe that [he] would be  
7 immune to being influenced." Dkt. # 43, Ex. 1, p. 188. Despite these events, in January 2010,  
8 Williams applied for and was promoted to an FMLA Coordination EAS 18 position, which resulted in  
9 a slight pay raise. *See* Dkt. # 52, Ex. 2, p. 41. Williams remained in this position until it was  
10 transferred to Greensboro, North Carolina in April 2011. *See id.* at Ex. 1, p. 76.

11  
12 On April 18, 2008, Williams filed a formal complaint with OSHA alleging that Defendant had  
13 retaliated against him in response to his assistance to Banani, subjecting him to harassment,  
14 intimidation, and a hostile work environment in violation of Section 11(c) of the Act. *See* Dkt. # 44,  
15 Ex. 1; Williams Decl., ¶ 59. On April 21, 2008, OSHA assigned an investigator to the complaint and  
16 sent USPS a formal letter, notifying it that the investigation could result in litigation. Dkt. # 44, ¶¶ 3-4,  
17 Ex. 1. Williams made three subsequent complaints regarding the same treatment, and OSHA's  
18 investigation of the matter continued until January 12, 2012. *Id.* at ¶ 5. Shortly thereafter, the DOL  
19 filed the instant lawsuit pursuant to its statutory authority to prosecute whistleblower claims. *See* 29  
20 U.S.C. § 660(c)(2). The Department of Labor has since moved the Court to sanction USPS for its  
21 alleged spoliation of documents relevant to this litigation (Dkt. # 42), which the Court addresses in an  
22 accompanying Order on spoliation. Through the instant Motion for Summary Judgment, Defendant  
23 seeks dismissal of all claims in Plaintiff's operative complaint (Dkt. # 31).

24 **Summary Judgment Standard**  
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1 A motion for summary judgment requires the court to determine whether the movant is entitled  
2 to judgment as a matter of law on identified claims or defenses based on the evidence thus far  
3 presented. Fed. R. Civ. P. 56(a). Summary judgment is proper where “the movant shows that there is  
4 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
5 Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are  
6 those that may affect the outcome of the suit under governing law. *Id.* at 248. An issue of material fact  
7 is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving  
8 party.” *Id.*

9 In ruling on a motion for summary judgment, the court is not empowered to make credibility  
10 determinations or weigh the evidence, but may only determine whether there is a genuine issue of fact  
11 for trial. *Crane v. Conoco*, 41 F.3d 547, 549 (9th Cir. 1994); *Anderson*, 477 U.S. at 255. However,  
12 conclusory allegations and speculative or unsubstantiated testimony are insufficient to raise a genuine  
13 issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69  
14 F.3d 337, 345 (9th Cir. 1995). Further, “the inferences to be drawn from the underlying facts...must  
15 be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co.*  
16 *v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “In evaluating motions for summary judgment in the  
17 context of employment discrimination, [the Ninth Circuit] has emphasized the importance of zealously  
18 guarding an employee’s right to a full trial, since discrimination claims are frequently difficult to  
19 prove without a full airing of the evidence and an opportunity to evaluate the credibility of the  
20 witnesses.” *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004); *see also Lam v.*  
21 *Univ. of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994).

### 23 Analysis

24 Plaintiff’s complaint asserts a single cause of action, on which Defendant now moves for  
25 summary judgment: that USPS discriminated against Mr. Williams in retaliation for his protected  
26

1 activities, thereby violating OSHA's whistleblower protection provision, § 11(c) of the Act, 29 U.S.C.  
2 § 660(c)(1). Defendant contends that Plaintiff has failed to meet its burden to show that USPS took  
3 any adverse employment action against Williams on account of his engagement in protected activity.  
4 Defendant further contends that Plaintiff's alternative theory – that USPS discriminated against  
5 Williams by creating a hostile work environment – is not available under § 11(c) and not supported by  
6 the evidence.

7  
8 The announced purpose of the Act is to “assure so far as possible every working man and  
9 woman in the Nation safe and healthful working conditions.” 29 U.S.C. § 651(b). Section 11(c)  
10 furthers this goal by safeguarding employees against adverse actions taken on account of their  
11 engagement or suspected engagement in protected activity, thereby ensuring that violations of the Act  
12 are reported. *See Reich v. Hoy*, 32 F.3d 361, 368 (8th Cir. 1994). Section 11(c)(1) prohibits any  
13 employer from “discharg[ing] or in any manner discriminat[ing] against any employee because such  
14 employee has filed a complaint or instituted or caused to be instituted any proceeding under or related  
15 to this chapter...or because of the exercise by such employee on behalf of himself or others of any  
16 right afforded by this chapter.” 29 U.S.C. § 660(c)(1). Section 11(c)(2) further authorizes the Secretary  
17 of Labor to bring an action in federal district court upon the filing and investigation of a complaint by  
18 an “employee who believes that he has been discharged or otherwise discriminated against” in  
19 violation of the Act. In analyzing a claim under § 11(c), courts analogize to other employment  
20 discrimination statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* *See,*  
21 *e.g., Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993); *Chao v. Norse Dairy*  
22 *Systems*, 2007 WL 2838958, \* 9 (S.D. Ohio 2007).

23 In analyzing a retaliation claim under § 11(c), courts have adopted a three-stage burden-  
24 shifting framework for analysis as applied to discrimination cases in general. *See, e.g., Schweiss*, 987  
25 F.2d at 549; *Solis v. Consolidated Gun Ranges*, 2011 WL 1215028, \*7 (W.D. Wash. 2011). Plaintiff  
26

first bears the burden to establish its *prima facie* case by showing: (1) participation in a protected activity, (2) a subsequent adverse action by the employer, and (3) a causal connection between the protected activity and the subsequent adverse action. *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 365 (8th Cir. 1994); *Solis*, 2001 WL 1215028 at \*7. At the summary judgment stage, “the degree of proof necessary to establish a *prima facie* case is minimal and does not even need to rise to the level of preponderance of the evidence.” *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1036 (9th Cir. 2005). Second, once the plaintiff makes out its *prima facie* case, the burden shifts to the employer to articulate an appropriate non-discriminatory reason for its action. *Id.* Finally, if the employer carries this burden, the burden shifts back to the plaintiff to demonstrate that the employer’s proffered reason is pretextual. *Id.*; *see also McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004) (applying burden-shifting approach to retaliation claim under Title VII); *Manatt v. Bank of America, NA*, 339 F.3d 792, 800 (9th Cir. 2003) (same).

### **1. Prima Facie Case of Retaliation**

Defendant does not dispute that Williams engaged in protected activity by assisting Naseem Banani in filing an OSHA complaint to report health and safety concerns on February 20, 2008, and further by accompanying an OSHA inspection of the P&DC on March 19, 2008 and filing complaints of retaliation against OSHA. *See* Dkt. # 51-1, p. 17. Rather, Defendant contends that USPS has failed to establish the second and third prongs of its *prima facie* case. The Court disagrees.

#### **a) Adverse Actions**

In order to meet its burden of showing an adverse employment action, the Department of Labor “must show that a reasonable employee would have found the challenged action materially adverse,” which means that the action “might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’ ” *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.D.C. 2006). (2006); *see also*



1 *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011) (applying *Burlington Northern*  
2 standard). The requirement to show “*material adversity*” weans out “petty slights, minor annoyances,  
3 and simple lack of good manners” that do not rise to a level that will deter a victim of discrimination  
4 from lodging a report. *Burlington Northern*, 548 U.S. at 68. In adopting the “reasonable employee”  
5 standard, the Supreme Court further emphasized that alleged harms are to be judged by an objective  
6 standard that takes into account the particular circumstances under which they occur. *Id.* To be  
7 materially adverse, an action need not rise to the level of an ultimate employee action, such as  
8 discharge. *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000). Rather, actions such as a lateral  
9 transfer, an unfavorable job reference, or a change in work schedule may be sufficiently severe under  
10 the circumstances to deter a reasonable employee from complaining about discrimination. *Id.*; *see also*  
11 *Burlington Northern*, 548 U.S. at 69.

12       Plaintiff asserts a number of discrete adverse actions, principally: Williams’ transfer and  
13 reassignment to lower-level duties, restrictions on his communications, placement in a cold and  
14 isolated storage space, an unwarranted negative performance review, and refusal to consider him for a  
15 job promotion. The Court has little difficulty in finding that Plaintiff has presented evidence that is  
16 sufficient, when viewed in the light most favorable to Plaintiff as the non-moving party, to raise a  
17 genuine issue of fact for trial as to whether several of these actions could have dissuaded a reasonable  
18 employee in Williams’ circumstances from lodging a discrimination complaint. Prior to his protected  
19 activity, Williams possessed substantial discretionary responsibility for ensuring compliance with  
20 health and safety rules in four USPS facilities, including through investigating accidents and filing  
21 reports. Williams’ transfer to the Queen Anne District Office substantially altered the nature of his  
22 employment, curtailing his job responsibilities to the point where he could do little more than clean his  
23 desk and file already prepared reports and placing him in a cold, damp corner of the new facility. His  
24 managers further imposed restrictions on Williams’ communications and job functions that were  
25 regarded as unusual and even unprecedented. *See, e.g.*, Dkt. # 57, Ex. 4, pp. 69-70, 67-77; *id.* at Ex. 7,  
26

p. 43. Under the circumstances, the Court finds that a rational factfinder could permissibly infer that a reasonable person would be deterred from reporting discrimination if doing so would result in a transfer that substantially curtailed his discretion, stunted his duties, and placed him in a foreboding corner of an unfamiliar facility. *See Kessler v. Westchester County Dept. of Social Services*, 461 F.3d 199, 209-20 (2d Cir. 2006) (finding transfer to constitute materially adverse harm under similar circumstances). A trier of fact could also find Williams' undeserved negative performance review and the refusal to consider him for a promotion, if proven, to constitute cognizable adverse employment actions. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 785 (9th Cir. 1986).

Defendant's argument that none of these activities rose above the level of "petty slights or minor annoyances" is both unconvincing and misstates the Supreme Court's standard for material adversity. *See* Dkt. # 51-1, citing *Burlington Northern*, 548 U.S. at 68. Though Williams' official job title and pay were unaffected by his transfer, the Supreme Court has squarely held that a material adverse action need not alter the "terms and conditions of employment" or carry tangible economic loss. *See Burlington Northern*, 548 U.S. at 70. Rather, a work reassignment without formal demotion can constitute a cognizable harm sufficient to deter reporting where, as here, it is attended by loss of prestige and newly subjects the employee to undesirable job duties. *Id.* at 70.

#### b) Causal Connection

In order to establish the third prong of its *prima facie* case, DOL must present, through circumstantial evidence or otherwise, "some evidence of a causal connection between the protected activity" and the subsequent adverse actions. *Reich*, 32 F.3d at 367. Per the Act's implementing regulations, "the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action." Rather, a plaintiff can meet its burden by showing that the "protected activity was a substantial reason for the action, or [that] the discharge or other adverse action would not have taken place 'but for' engagement in protected activity." 29 C.F.R. § 1977.6(b);

1 *see Consolidated Gun*, 2011 WL 1215028 at \*7. Here, Plaintiff has met its burden by providing some  
2 evidence of causal connection, and Defendant has so conceded on reply. *See* Dkt. # 61, p. 3 n. 1. The  
3 temporal proximity between Williams’ assistance to Banani and his transfer only five days later, and  
4 on the very same day that USPS received notification by OSHA of a complaint, provides  
5 circumstantial evidence of retaliatory motive. *See Dawson v. Entek Intern.*, 630 F.3d 928, 937 (9th  
6 Cir. 2011) (“[T]emporal proximity can by itself constitute sufficient circumstantial evidence of  
7 retaliation for purposes of both the prima facie case and the showing of pretext.”); *cf. McGinest*, 360  
8 F.3d 1103 (declining to find causation where adverse action occurred one and a half years after the  
9 protected activity and plaintiff relied solely on timing). The Court also finds unconvincing  
10 Defendant’s contention that Plaintiff lacks evidence of causation with respect to USPS’s decision to  
11 pass Williams over for a promotion, where this action occurred approximately nine months after  
12 Williams’ assistance to Banani. Defendant overlooks Williams’ subsequent protected activities,  
13 including his filing of OSHA complaints on April 18, 2008 and July 7, 2008, which triggered  
14 investigations that were ongoing at the time Williams applied for the managerial role. *See Williams*  
15 *Decl.* at ¶ 59. *See also Singletary v. District of Columbia*, 351 F.3d 519, 526 (D.C.Cir. 2003). Whether  
16 this temporal proximity, combined with other evidence discussed *infra*, is sufficient to establish a  
17 causal link is a question properly resolved at trial. Accordingly, the Court finds that Plaintiff has  
18 sufficiently made out its *prima facie* case in order to survive summary judgment.

## 20 **2. Pretext**

21 Ordinarily, once the plaintiff makes out its prima facie case, the burden shifts to the defendant  
22 to offer an alternative explanation for its actions. Defendant in its briefing fails to offer any alternative  
23 explanation for the majority of the alleged adverse actions, limiting its arguments to contesting  
24 Plaintiff’s ability to make out its *prima facie* case. *See* Dkt. # 61, p. 5 (arguing that “none of the  
25 allegedly material adverse actions (through the October 2009 non-selection) could stand on their own  
26 for purposes of establishing a *prima facie* case of retaliation”). The Court has already found that

1 Plaintiff has adduced sufficient evidence to raise material issues of fact for trial as to retaliation based  
2 on Williams' transfer, de facto demotion, and other materially adverse actions. As Defendant has  
3 failed to offer an alternative explanation for these actions, Defendant has failed to carry its burden to  
4 show that summary judgment is warranted on these grounds. As to Williams' non-selection in 2009  
5 for the EAS 20 safety manager position, Defendant offers the alternative explanation that Williams  
6 was unqualified for the role. Defendant asserts that "[a]t least one member of the Selection Committee  
7 (Kosmicki) adjudged Williams as not qualified for the position because Williams lacked  
8 managerial/supervisory experience." Dkt. # 51-1, p. 23. The Court, however, finds that Plaintiff has  
9 adduced sufficient evidence that, if credited, could support the conclusion that this proffered  
10 explanation is pretextual.

11       There are two ways in which a plaintiff may demonstrate pretext: "(1) directly, by showing  
12 that unlawful discrimination more likely than not motivated the employer; or (2) indirectly, by  
13 showing that the employer's proffered explanation is unworthy of credence because it is internally  
14 inconsistent or otherwise not believable." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112-  
15 13 (9th Cir. 2011); *see also Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1029 (9th Cir.  
16 2006); *McGinest*, 360 F.3d at 1123; *Desert Place, Inc. v. Costa*, 539 U.S. 90 (2003) (suggesting that a  
17 plaintiff may rely on either circumstantial or direct evidence of discriminatory motive to prove her  
18 case under Title VII). "Direct evidence of animus...creates a triable issue" as to an employer's motive  
19 in taking adverse actions, "even if the evidence is not substantial." *Dominguez-Curry*, 424 F.3d at  
20 1038; *see also Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d at 1128 (9th Cir. 2000) ("The  
21 plaintiff is required to produce 'very little' direct evidence of the employer's discriminatory intent to  
22 move past summary judgment.") (citing *Godwin*, 150 F.3d at 1221). Direct evidence is that which  
23 "proves the fact of [discriminatory animus] without inference or presumption." *Id.* The Ninth Circuit  
24 has "repeatedly held that a single discriminatory comment by a plaintiff's supervisor or decisionmaker  
25 is sufficient to preclude summary judgment for the employer." *Id.* at 1039.

1 The DOL has met its burden to show pretext for the purposes of summary judgment by  
2 introducing direct evidence that raises a triable issue as to whether discriminatory animus motivated  
3 USPS's decision to pass Williams over for a promotion. A trier of fact could find Helen Pelton's  
4 comment to Kosmicki that she did not want William's name put forward for an interview because of  
5 his "Whistleblower complaint," Dkt. # 57 at Ex. 11, p. 50, to be clear and unambiguous evidence of  
6 her retaliatory motive. Viewed in a light favorable to Plaintiff, Pelton's comment directly shows,  
7 without need for inference, that she possessed animus against Williams because of his protected  
8 activities and further that this animus motivated her to ensure that Williams would not receive fair and  
9 equal consideration for the safety manager position, despite his qualifications. Further, a trier of fact  
10 could find that other emails from Williams' managers disparaging his OSHA activities and even  
11 reprimanding him for his "continuing and obvious interest in representing the bargaining unit," *see*  
12 Dkt. # 57 at Ex. 9, p. 19, provide additional direct evidence of retaliatory motive behind Williams'  
13 transfer and *de facto* demotion. This evidence of discriminatory intent is alone sufficient to preclude  
14 summary judgment.<sup>2</sup>

### 15 **3. Hostile Work Environment**

16 Plaintiff rests its § 11(c) retaliation claim on an additional theory, asserting that the various  
17 discrete alleged adverse employment actions taken by USPS, when combined, subjected Williams to a  
18 hostile work environment, amounting to a materially adverse action taken on account of Williams'  
19 protected activities. As an initial matter, Defendant contends that a hostile work environment claim is  
20 not cognizable under the Act's anti-retaliation provision. Defendant further contends that even if §  
21 11(c) supports a hostile work environment retaliation claim, DOL's evidence is insufficient to raise a  
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24  
25 <sup>2</sup> As a result, the Court need not reach consideration of circumstantial evidence that Plaintiff adduces, including temporal  
26 proximity and deviation from normal institutional practices to Williams' detriment. *See Dawson*, 630 F.3d at 937; *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011).

1 triable issue of material fact as to whether Williams' work environment was actionably severe or  
2 pervasive. *See* Dkt. # 51-1, p. 19. The Court considers both of these objections in turn.

3 Defendant correctly asserts that neither the Ninth Circuit, nor any other circuit that the Court  
4 has been able to identify, has expressly found a hostile work environmental claim to be cognizable  
5 under § 11(c). The Ninth Circuit has, however, found that imposition of a hostile work environment  
6 can amount to retaliation under Title VII. *See Ray*, 217 F.3d at 1245. Other circuits are in accord. *See*,  
7 *e.g.*, *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 446 (2d Cir. 1999)  
8 (holding that "co-worker harassment, if sufficiently severe, may constitute adverse employment action  
9 so as to satisfy the second prong of the retaliation *prima facie* case"); *Drake v. Minnesota Mining &*  
10 *Mfg. Co.* 134 F.3d 878, 886 (7th Cir. 1998) ("[R]etaliation can take the form of a hostile work  
11 environment"); *Gunnel v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998); *Hussain*  
12 *v. Nicholson*, 435 F. 3d 359, 366 (D.C. Cir. 2006) ("In this circuit, a hostile work environmental can  
13 amount to retaliation under Title VII."). Plaintiff correctly notes that Section 11(c) is "broadly  
14 construed by the courts" in order to protect complaining employees and to advance the salutary  
15 objectives of the Act. *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 722 (6th Cir. 1979), affirmed, 445  
16 U.S. 1, 63. Further, the Court takes notice that anti-discrimination precepts developed in the Title VII  
17 context are frequently imported into § 11(c) analyses. Defendant has identified no reason that the  
18 Court should refrain from analogizing to Title VII in this instance, which similarly prescribes "adverse  
19 treatment that is based on retaliatory motive and is reasonable likely to deter the charging party or  
20 others from engaging in the protected activity." *Ray*, 217 F.3d at 1245, citing EEOC Compliance  
21 Manual ¶ 8008. With respect to both statutes, severe and pervasive harassment in retaliation for  
22 protected activity would seem to be paradigmatic of adverse treatment that the whistleblower  
23 provisions were designed to guard against. *Id.*

25 Nonetheless, the Court is not prepared, on the basis of the parties' relatively scant briefing on  
26 this issue, to squarely determine this issue of first impression at this stage of the proceedings. In

1 importing status-based hostile work environment claims in the ADA context, the Tenth Circuit in  
2 *Lanham v. Johnson County, Kansas*, 393 F.3d 1151, 1155-56 (10th Cir. 2004) drew on an extensive  
3 discussion of the similarities between the purposes and remedial structures of the statutes, which it  
4 found to be indicative of Congress' intent to treat the ADA no less expansively than Title VII. *See*  
5 *also, Morgan v. Napolitano*, 2013 WL 6782845, \*11 (E.D. Cal. 2013). Here, the parties have failed to  
6 engage in statutory interpretations or to identify other indications of congressional intent to bolster this  
7 Court's decision one way or the other. Further, the parties have declined to address the way in which a  
8 hostile work environment claim would square with the burden-shifting framework employed in the §  
9 11(c) context. For instance, if Plaintiff establishes a hostile work environment sufficient to make out  
10 the second prong of its *prima facie* case, would the burden then shift to Defendant to produce an  
11 alternative explanation as to this environment as a whole or with respect to each component action  
12 individually? Would direct evidence of discriminatory intent with respect to any component action  
13 suffice to show pretext for the whole? As the parties have declined to engage in robust analyses of  
14 these issues, the Court defers its determination on the availability of a hostile work environment  
15 retaliation claim under § 11(c) and directs the parties to further brief this question, should it remain a  
16 subject of dispute, in a motion in limine prior to trial. The Court finds that this legal question may be  
17 appropriately resolved at that stage. As Plaintiff asserts hostile work environment based on the  
18 cumulative effects of allegedly retaliatory discrete acts, this question goes not to the evidence to be put  
19 on at trial but rather to the way that the evidence will be argued to the fact-finder.

20  
21 To the extent that a hostile work environment claim is cognizable under § 11(c), the Court has  
22 little trouble locating material issues of fact that require the existence of a hostile work environment to  
23 be ascertained at trial. Discrete acts that plaintiff claims are independently actionable as adverse  
24 employment actions can simultaneously constitute a hostile work environment so long as they are  
25 adequately connected to each other as part of the same unlawful employment practice and together  
26 meet the hostile work environment standard. *Baird v. Gotbaum*, 662 F.3d 1246, 1252-53 (D.C.Cir.



1 2011). To constitute an actionable hostile work environment, harassment must be “sufficiently severe  
2 or pervasive to alter the conditions of the victim’s employment and create an abusive work  
3 environment.” *Ray*, 217 F.3d at 1245; *see also McGinest*, 360 F.3d at 1113. The plaintiff must show  
4 that the work environment was both subjectively and objectively hostile. *Id.* That is, the plaintiff must  
5 show that the employee perceived his work environment to be hostile and that a reasonable person in  
6 his position would also perceive it to be so. *Dominguez-Curry*, 424 F.3d at 1034. In considering  
7 whether the alleged conduct rises to the level of creating an objectively hostile work environment, the  
8 court “assess[es] all the circumstances, including the frequency of the discriminatory conduct; its  
9 severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and  
10 whether it unreasonably interferes with an employee’s work performance.” *Id.* (internal quotations  
11 omitted). It is sufficient to create actionable harassment that the “hostile conduct pollutes the victim’s  
12 workplace, makes it more difficult for her to do her job, to take pride in her work, and to desire to stay  
13 on in her position.” *McGinest*, 360 F.3d at 1113.

14       The DOL has put forward sufficient evidence to show that a trier of fact could find  
15 Defendant’s conduct toward Williams following his protected activity both subjectively and  
16 objectively hostile. Williams clearly considered it to be so, taking FMLA leave due to extreme stress  
17 and anxiety, seeking psychiatric treatment, lodging multiple OSHA complaints in response to  
18 continuing instances of perceived harassment, and describing USPS’s activities as amounting to a  
19 “campaign to punish me.” Williams Decl. at ¶ 100. DOL has produced evidence of a string of  
20 incidents of harassment, closely connected in time and by the identity of their perpetrators, including:  
21 William’s precipitous transfer, his placement in an embarrassing and uncomfortable work location, his  
22 isolation from other team members, restrictions on his communications, unusual and significant  
23 curtailments of his work responsibilities, public berating of his competency, questioning of his loyalty,  
24 multiple antagonistic interviews, and his placement on forced leave. From an objective point of view,  
25 a reasonable person could find that USPS’s actions together were both sufficiently severe and  
26



1 pervasive so as to pollute Williams' work place, change the conditions of his employment, render it  
2 more difficult for him to perform and take pride in his work, and dampen his desire to stay in his  
3 position. Accordingly, the Court denies summary judgment on Plaintiff's hostile work environment  
4 retaliation claim and directs the parties to further brief its availability as discussed herein.

5  
6 **Conclusion**

7 For the reasons discussed herein, the Court hereby ORDERS that Defendant's Motion for  
8 Summary Judgment (Dkt. # 51) is DENIED. The Court further directs the parties to include briefing  
9 with their motions in limine of no more than ten (10) pages as to whether a hostile work environment  
10 constitutes an adverse employment action for the purpose of a retaliation claim under § 11(c) of the  
11 Act and to what extent the burden-shifting framework is affected where Plaintiff relies on a hostile  
12 work environment theory.

13 DATED this 12 day of August 2014.

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16 RICARDO S. MARTINEZ  
17 UNITED STATES DISTRICT JUDGE  
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